IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELLIOTT & FRANTZ, INC.	:	CIVIL ACTION
v.	:	
INGERSOLL-RAND COMPANY	:	NO. 03-04746-JF

MEMORANDUM AND ORDER

Fullam, Sr. J. February 27, 2007

Plaintiff, Elliott & Frantz, Inc., was formerly a distributor of the products of the defendant (earth-movers and similar heavy equipment). Ingersoll-Rand Company terminated the distributorship contract as of the end of 2003. This lawsuit followed.

Initially, plaintiff contended, principally, that the defendant had no right to terminate the contract, because it could only be terminated for cause, and cause was lacking. Plaintiff also contended that the defendant had breached its obligation of good faith and fair dealing, because the termination was the result of a secret change in policy in which the defendant decided to terminate its distributorships in favor of company-owned stores.

At an early state of this litigation, I granted the defendant’s motion for summary judgment, ruling (1) that the contract could be terminated without cause, provided specified notice was given (and it was, in this case); (2) that the parties had not amended the contract’s termination provisions; and (3)

that the defendant had the right to change its policy, and therefore could not be held liable for breach of faith or unfair dealings. Plaintiff appealed. The Third Circuit Court of Appeals affirmed my rulings that the defendant had properly terminated the contract, and was not guilty of bad faith. The Court reversed in part, however, concluding that there were disputed issues of fact with regard to whether the defendant had breached a provision in the distributorship agreement which required the defendant to "provide sales assistance, engineering and application advice, reasonable quantities of advertising materials, and campaigns and instruction in sales and service." The case was remanded for trial of those remaining factual disputes (together with defendant's counterclaim against plaintiff, which had been severed and was not included in the appeal).

After a four-day trial, which was very aggressively conducted, the jury rendered a verdict in favor of the plaintiff, in the net amount of $315,329.54. More specifically, the jury found that the defendant had failed to supply the required sales assistance, etc., and that this failure damaged plaintiff in the total amount of $420,000. The jury further found that plaintiff owed the defendant $135,692.46 on its counterclaim, but that plaintiff was entitled to credit against this sum in the amount of $31,022.

In the course of the trial, the defendant had filed a motion for judgment as a matter of law. I deferred ruling on that motion, and submitted the case to the jury. After the jury rendered its verdict, I entered an order on January 23, 2007, denying defendant's motion for judgment as a matter of law, and declining to grant a new trial. The defendant has now renewed its motions, contending that the jury's verdict is not adequately supported by the evidence; that the verdict represents an award of consequential damages, which were expressly barred in the written distributorship contract; that, in any event, there was no proof that the damages awarded were caused by the defendant; and that, for these reasons, the jury's verdict should be set aside, and judgment entered in favor of the defendant.

Alternatively, the defendant seeks a new trial. In support of that motion, the defendant refers to "the court's erroneous and improper charge to the jury" which, according to defense counsel, "was misleading and did not adequately apprise the jury of the law, it was unfairly prejudicial, and it amounted to fundamental error and a miscarriage of justice."

Jury Instructions

The issues to be decided by the jury were straightforward: Did the defendant fail to provide the agreed level of sales support and assistance? If not, did its breach of the contract cause plaintiff to suffer damages, and, if so, in

what amount? These issues were submitted to the jury in a relatively brief charge, to which neither side expressed any objection.

A possible exception to this statement: after the charge was completed, defense counsel asked that the jury be instructed that it should disregard any evidence which it heard concerning the termination of the contract. I rejected that request as unnecessary, and I now adhere to that view, since (1) the jury had not heard any evidence to suggest that the termination of the contract was improper; (2) all attempts to introduce evidence on that subject (most of which had come from the defendant), had been rejected; (3) plaintiff's counsel had expressly stated, in his closing argument, that the defendant had a perfect right to terminate the contract as it did; and (4) the court's charge, and the jury interrogatories, adequately instructed the jury about the issues that they were to consider. Defendant's motion for a new trial is totally lacking in merit.

Sufficiency of the Evidence

As noted by the Court of Appeals, the relevant language of the distributorship agreement was somewhat ambiguous, open to different interpretations as to what constituted the required amount of "sales assistance, engineering and application advice ... and campaigns and instruction in sales and service." The jury was told that it would be appropriate to consider the

parties' actions in carrying out the agreement, as a guide to how the parties themselves had interpreted their agreement. There was ample evidence to support the notion that both sides had been happy with the amount of support being provided by the defendant until, in early 2002, the person who had been principally involved in fulfilling these responsibilities on behalf of the defendant was replaced, and that his replacement virtually ignored the plaintiff and its sales efforts. It was also reasonably clear that, from and after this personnel change, plaintiff's revenues from sales of defendant's products declined sharply. There was also evidence which purported to rule out any other cause of the declining revenues except defendant's failure to provide the customary degree of support. Plaintiff presented expert testimony to the effect that, if the defendant's breach was the sole cause of the decline in revenues, plaintiff's damages amounted to $560,000 (calculated at the rate of $35,000 per month for a period of 16 months). It was not unreasonable for the jury to conclude that some of the decline in revenues may have been the result of general economic conditions, and/or that the period of breach was somewhat less than the claimed 16 months. But the jury was not required to calculate damages with mathematical precision. I am not at liberty to interfere with the jury's ultimate resolution of these issues.

The defendant further contends that the jury awarded "consequential" damages, and that such damages are precluded by the language of the contract, which provides, in paragraph 12(C):

> "Except for claims by third parties, in no event shall either party to this Agreement be liable to the other for any consequential, incidental, indirect, special or punitive loss or damage arising out of this Agreement, whether or not such loss or damage is based on contract, warranty, negligence, indemnity, strict liability or otherwise."

Contrary to the defense argument, I conclude that the damages awarded by the jury in this case constitute direct damages. The jury found that the defendant failed to comply with its contractual obligation to provide sales support and assistance, etc., and that this caused a reduction in plaintiff's revenues (without any reduction in plaintiff's expenses). Unless this type of damage is regarded as direct, defendant would totally avoid liability for breaching the contract. This cannot have been the intention of the contracting parties, and would violate public policy if it were. Here again, I am satisfied that the jury reached a reasonable and sustainable verdict.

Motions to Amend the Verdict

Both parties seek to have the verdict molded to include pre-trial interest, and the defendant also seeks attorney's fees on its counterclaim. Neither side raised the issue of pre-judgment interest at trial, and I consider that issue to have been waived. Moreover, in view of the uncertainty as to

precisely when each party should have paid the other, I doubt the feasibility of re-visiting the issue post-trial. Defendant's claim for attorney's fees is devoid of merit: the Security Agreement relied upon contemplated attorney fees only in connection with foreclosure sale of collateral.

Conclusion

The evidence was sufficient. There is no basis for granting a new trial, or for amending the verdict. All post-trial motions will be denied.

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ORDER

AND NOW, this 27th day of February, 2007, IT IS ORDERED:

1. All post-trial motions are DENIED.

2. JUDGMENT is ENTERED in favor of the Plaintiff, Elliott & Frantz, Inc., and against the Defendant, Ingersoll-Rand Company, in the sum of $315,329.54.

3. The Clerk is directed to close the file.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.